

Group Briefing Summer 2016

Pensions Update

1. PENSIONS AUTHORITY UPDATE

New Codes for Defined Contribution Schemes

The Pensions Authority (the “**Authority**”) has published the second and third tranches of a proposed four sets of codes of governance (the “**Codes**”) to be published in 2016 to help trustees of defined contribution schemes (“**DC Schemes**”) meet the Authority’s standards of practice for good scheme governance and administration. The Codes are not statements of law but rather they are intended to supplement the Authority’s Trustee Handbook. These codes do not apply to defined benefit schemes but many of the same principles do. The first tranche was published on 27 January and included Codes on the establishment of a governance plan of action, procedures for trustee meetings and the management of conflicts of interest.

Set 2: Codes relating to contributions, investment and payment of benefits

These Codes give trustees guidance on: monitoring the payment of contributions to a scheme; investing scheme assets in the interests of beneficiaries; and making arrangements for the payment of benefits as they become due. The Codes set out how the trustees may choose to delegate their relevant functions (e.g. to an administrator or an investment

manager) but it is stressed that trustees are ultimately responsible for functions carried out by any agent on their behalf. It is recommended that a service level agreement should be entered into between the trustees and the scheme administrator/investment manager.

Comment: Many schemes will have written administration agreements but it may be prudent to review how up to date the agreements are and the level of reporting/monitoring of the service levels.

Set 3: Codes relating to records, data protection and risk management

These Codes cover: effective record keeping procedures; and data protection and risk management. The Codes note that inadequate or incomplete records can negatively impact trustees’ ability to pay benefits with knock-on consequences for members. The Codes state that the trustees must also be aware of their data protection obligations to members under the scheme’s trust deed and rules. The Codes give guidance to trustees on how to obtain, store and process personal data as the trustees are the persons responsible for the control and use of that personal data i.e. the data controller. The Authority expects that trustees are aware of their obligations as data controllers and that they will comply with the Data Protections Acts of 1988 and 2003.

In accordance with the Codes, the Authority expects trustees to have a risk management system in place. It should include strategies, processes and a risk register to record all known scheme risks. The risk register should be reviewed and updated at least annually by undertaking a risk assessment.

Consultation document issued by the Authority

The Authority has published a proposal for reform of supplementary funded private pensions in Ireland and on which they are seeking consultation from stakeholders by 3 October 2016. The main proposals made by the Authority relate to: changes to trusteeship to require a minimum standard of qualification and experience; the extension of the current system of scheme registration with the Authority to align with international best practice; a proposal to create binding codes of practice on trustees; the rationalisation of pension vehicles and the increased adoption of master trusts.

2. LEGISLATIVE UPDATES

Companies Act, 2014

The Companies Act, 2014 (the “**Act**”) was generally commenced with effect from 1 June 2015. There is an 18 month transition period ending on

30th November 2016 during which all existing private limited companies will be dealt with as though they are designated activity companies (“**DACs**”). At the end of the transition period, they will be deemed to have become new model private companies (“**LTDs**”) unless they elect to become DACs or some other type of company. Trustee companies should consider their registration with the CRO if they have not done so already.

Comment: The most significant aspect for “special purpose” trustee companies with restricted objects is that if the company is not converted to a DAC it will lose its restricted objects meaning that its activities are not restricted to trusteeship alone.

ARF Option for DB Members

A change to the Revenue Commissioner’s administrative procedures effective from 22 June 2016 means that former defined benefit scheme members whose benefits were transferred to a buy-out bond may now access an Approved Retirement Fund (“**ARF**”) rather than being restricted to the purchase of an annuity.

Negative Revaluation for DB “preserved benefits”

The Occupational Pension Schemes (Revaluation) Regulations, 2006 (the “**Regulations**”) signed by the Minister for Social Protection on 7 April 2016 prescribe a -0.3% revaluation of preserved pension benefits for 2015. A previous amendment made to the Pensions Act, 1990 (the “**Act**”) by the Social Welfare and Pensions Act 2012 provided that the preserved benefit could be adjusted (whereas the Act had previously provided for an increase in the rate). The effect of these two amendments is that **preserved** pension benefits, for the purposes of the Act, decrease by 0.3% for the revaluation year 2015.

In order to establish how the revaluation percentage applies to **deferred** benefits under a particular DB scheme, an examination of the scheme rules is

required. The deciding factor will usually be whether the rules state that an increase is to be applied or whether it is to be adjusted or revalued. If the rules state increase, then the industry interpretation is that a floor of zero applies. On the other hand, if the scheme rules refer to “revaluation” or “adjustment” of benefits then a negative rate of revaluation could be applied to deferred benefits. By contrast, when considering the technical valuation of preserved benefits for the purposes of the Pensions Act, the starting point is that it is reduced regardless of what scheme rules say.

Comment: Before applying revaluation factors trustees should carry out a review of the scheme provisions, including whether the same provisions apply to all categories of deferred members.

3. UPDATE ON IORPS (INSTITUTIONS FOR OCCUPATIONAL RETIREMENT PROVISION) DIRECTIVE

The Commission, the European Parliament and the Council of Ministers have concluded negotiations on the latest draft of the new EU pension’s directive.

Comment: The new Directive is unlikely to have a major impact on Irish pensions. The draft legislation no longer requires all trustees to have a professional qualification (which is at odds with the proposals in the Authority’s consultation paper). It provides for pre-retirement information to be issued broadly in line with existing Irish law requirements – there was previously a suggestion that this would be issued at least two years before retirement.

4. RECENT CASE LAW

Dr David Parris v Trinity College Dublin & Others C-443/15 – European Court of Justice

The Advocate General (the “**AG**”) has delivered her preliminary opinion that Dr Parris and his same sex partner were the subject of indirect discrimination based on their sexual orientation. The case was referred to the Court of Justice of the European Union (CJEU)

from the Irish Labour Court following an application by Dr Parris. Three questions were referred to the Court as a result of Dr Parris being advised that as he had not formalised his relationship with his partner prior to Dr Parris’s 60th birthday, his partner would not qualify for a survivor’s pension under the rules of the scheme. Dr Parris’s relationship could not be formalised prior to reaching his 60th birthday as legislation had not yet been enacted to permit this. Dr Parris argued that the rules of the scheme were in breach of the Pensions Act.

In considering the matter, the AG rejected the assertion that Dr Parris had been the subject of direct discrimination. However she supported the applicant’s claim that there had been indirect discrimination proposing that this arose from the combined effect of sexual orientation and age (even if discrimination was not made out from each of the individual factors).

The AG also rejected the submission that the decision should be restricted to take account of the fact that the discrimination arose from service which pre-dated the Equal Treatment Framework Directive.

UK Case law and formality requirements in amending pension schemes

Recent UK decisions from the High Court and the Court of Appeal have raised some uncertainty regarding the issue of retrospective amendments to a pension scheme and the level of formality required in doing so.

On 29 February 2016 the High Court of England and Wales held in *Safeway Limited v Andrew Newton & Safeway Pension Trustees Limited* that the levelling down of pensions (by increasing the Normal Pension Age of women from 60 to 65) by means of amendment followed later by retrospective deed was not effective until the execution of the deed. It was held that the announcement lacked the necessary degree of formality and was not sufficient to achieve retrospective equalisation, even where

the amendment power had a provision to back-date an amendment to a specific point in time.

Since the Safeway case, there have been two cases which appear to some extent to demonstrate a relaxation of the degree of formality required in making changes to schemes. In *Shannan v Viavi Solutions UK Ltd* [2016] EWHC 1530 (Ch) the High Court addressed retrospective amendments to a pension scheme's rules and the substitution of the principal employer. The Court decided that where there is a self-contained power to substitute a principal employer, a "degree of formality" should not be implied where none was expressly provided for and ruled that a substitution was effective without a deed.

In *MF Global UK Ltd (In Special Administration), Re* [2016] EWCA Civ 569 the Court of Appeal highlighted the effects of informal arrangements in the secondment of employees between group companies. The Court held that although there was no express contract between the service company and the UK subsidiary, the UK subsidiary was liable by way of implied contract for the pension costs of the seconded employees, and this was because it was acting in accordance with the express contract held between MF Global and the service company. The express contract provided that where a group company was using the seconded employees it should pay all the costs (including the pension costs) incurred by the service company in respect of the seconded employees. There was however very little formality to the arrangements and no formal deeds of participation with the pension scheme.

Comment: The level of formality required when attempting to make retrospective amendments to pension schemes remains something of a grey area. The Irish courts have not yet ruled on this issue and it is uncertain how these English decisions would be interpreted by the Irish courts. The better course of action is to ensure that deeds documenting changes are fully drafted in advance of the implementation date to avoid this issue.

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